

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 362
5444554

BETWEEN

JOYCE NAYATHODAN
Applicant

A N D

THE SELWYN FOUNDATION
Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
S Langton, Counsel for the Respondent

Investigation Meeting: 8 July at Whangarei

Submissions Received: 11 July 2014 from the Applicant
7 and 16 July 2014 from the Respondent

Date of Determination: 1 September 2014

DETERMINATION OF THE AUTHORITY

- A. I decline to exercise my discretion under s160(2) of the Act to admit the hearsay evidence from Ms Sobotka about Ms Golder's conversation with the applicant. It is inadmissible.**
- B. The alleged settlement agreement is unenforceable and does not prevent the Authority from determining the applicant's personal grievances. The personal grievance relating to her unjustified dismissal was therefore raised within time by the email dated 13 August 2013.**
- C. The applicant has, with the exception of the allegation of racial harassment, raised her personal grievances pursuant to s114 of the Act. Whether the racial harassment concern was raised as a personal grievance within time shall be determined at hearing.**
- D. Costs are reserved.**

Employment relationship problem

[1] The applicant, Joyce Nayathodan, was employed by the respondent, the Selwyn Foundation, until she was dismissed on 30 July 2013. Following discussions between the respondent and the applicant's Union representative, the dismissal was retracted and a resignation accepted on 16 August 2013. The applicant later alleged she was unjustifiably dismissed and disadvantaged by racial and sexual harassment, bullying and lack of support. She denies her resignation evidenced full and final settlement of her grievances.

[2] A hearing was set down on 8 July 2014 to determine preliminary issues about settlement of the applicant's personal grievances and whether she raised those grievances within 90 days pursuant to s114 of the Employment Relations Act 2000 (the Act).

Facts leading to dismissal

[3] The applicant commenced employment in January 2010 as a registered nurse at the respondent's Selwyn Park Rest Home in Whangarei. Her employment was covered by a collective agreement during all material times.

[4] During her employment she made allegations of racial and sexual harassment, bullying and lack of support to various managers and colleagues.

[5] In June 2011 she was the subject of allegations by her colleagues of harassment. A final written warning was issued in October 2011.

[6] In June/July 2013 she was involved in a further disciplinary process around her competency. She was dismissed on or about 30 July 2013.

[7] On 13 August 2013 the applicant's Union representative, Jeanette Golder, emailed the respondent's human resources manager, Lorraine Sobotka setting out concerns about the process leading to the applicants dismissal. Between 13 and 16 August 2013 Ms Golder and Ms Sobotka continued corresponding agreeing to retract the dismissal and accept the applicant's resignation.

[8] As a result, the applicant provided a resignation letter on 14 August 2013. On 16 August 2013 the respondent accepted her resignation and notified the New Zealand Nursing Council of the events leading up to her resignation.

[9] Between 16 August and October 2013 the applicant was subjected to an investigation by the New Zealand Nurses Council (the Council) about her competency. On 30 October 2013 the applicant received notification the Council was satisfied she was competent to practise.

[10] On 14 November 2013, the applicant wrote to the respondent formerly raising a personal grievance. She set out her concerns about the justification for the dismissal and a sexual harassment complaint.

[11] On 7 January 2014, an application to the Employment Relations Authority (the Authority) was filed. The application included an allegation the applicant had been racially harassed.

Was there an enforceable agreement reached on or about 16 August 2013 settling all of the applicant's personal grievances?

[12] The applicant disputed there was an agreement settling all of her personal grievances. At hearing she told me she was unaware of Ms Golder's correspondence with Ms Sobotka until she received Ms Sobotka's evidence. The emails between Ms Sobotka and Ms Golder were not copied to the applicant. Further, she stated Ms Golder never referred to settling all of her personal grievances in her discussions with the applicant. The applicant believed the respondent had "*accepted it was wrong*" and that was why her dismissal was converted to a resignation.¹

[13] The respondent submits there was an enforceable agreement settling all of the applicant's personal grievances. It also submits the applicant failed to call her Union representative to corroborate her evidence there was no full and final settlement agreement.

[14] Section 114 of the Act requires an employee who wishes to raise a personal grievance must raise the grievance with their employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee. This period may be extended by consent or leave if the delay was due to exceptional circumstances and it being just to do so (s114(3)). There is no consent to the extension of the period for filing.

¹ Oral evidence J Nayathodan 08/07/14

[15] The applicant did raise her personal grievances about her dismissal on 30 July 2013 by way of email from Ms Golder dated 13 August 2013. She is within the 90 time for raising these grievances and they were raised with sufficient specificity. The only issue precluding that grievance being determined by the Authority would be an enforceable full and final settlement agreement as proposed by the respondent.

[16] As it is the respondent who seeks to rely upon the existence of a settlement agreement removing the Authority's jurisdiction to hear these claims, the evidential onus rests upon the respondent, not the applicant, to prove on the balance of probabilities this is the case.

[17] Although there is no record of settlement signed off by a mediator under s149 of the Act, a settlement agreement may be still be enforced by the Authority where there is accord and satisfaction.

[18] Accord and satisfaction is the purchase of a release from an obligation.² There must first be a genuine dispute between the parties. Secondly, whether accord and satisfaction has been made is a question of fact requiring a meeting of the parties' minds or that one of them must act in such a way to induce the other to think that money (or other consideration) is taken in satisfaction of the claim.³ This requires an examination of any documents and circumstances of leading to settlement.

[19] The respondent produced email correspondence between Ms Golder and Ms Sobotka to evidence a settlement agreement. Ms Golder did not give evidence.

[20] An email dated 13 August 2013 from Ms Golder to Ms Sobotka raised concerns about the process leading to dismissal. The email is not stated as being a without prejudice communication. It specifies concerns about the lack of opportunity to respond to the allegations due to late notice and provision of information. It then goes onto state:

I find that all these things combined would be reason to lodge a PG. However, I am aware of the situation for Selwyn and Joyce would not want to return to work at Selwyn Park. Hence to avoid this process I suggest the retraction of the dismissal and Joyce will submit a letter of resignation effective 30 July 2013.

² *Cable Talk Astute Network Services Limited v Cunningham* [2004] 1 ERNZ 506

³ *Graham v Crestline Pty Limited* [2006] ERNZ 848 at para [49]

[21] Ms Golder's email was an offer to avoid the lodging of a personal grievance pertaining to the applicants grievances set out therein. It did not purport to settle all of her grievances. It did not give express assurance she would forgo her statutory rights to have her grievances determined by the Authority either.

[22] An email dated 13 August 2014 from Lorraine Sobotka advised she was authorised to retract the dismissal and accept a resignation. She then goes on to state:

Our intention in that regard would be (once we receive her written resignation) to write a letter which acknowledges receipt of her resignation, retracts the dismissal and accept her resignation. It will need to be clearly documented. History of events cannot be wiped out totally but at least she can honestly say to future employers that she has not been dismissed. We will also need to confirm in the letter that in accepting her resignation we still have an obligation to notify NZNC of events leading up to her resignation. This arrangement must be Without Prejudice and with an assurance that a PG will not be lodged.

[23] Ms Sobotka's email was in effect a counteroffer. It sought to introduce new terms namely notification to the Nursing Council of the events leading to dismissal and the arrangement be without prejudice. The express assurance sought was that a personal grievance would not be lodged. There was no express assurance sought that this would be in full and final settlement of all of the applicant's grievances or that the applicant would forgo her statutory rights to have her grievances determined by the Authority.

[24] Ms Golder replied by email dated 14 August 2013 she was "*happy to accept your decision*" and would get the resignation letter to her as soon as possible.

[25] On 16 August 2013 Ms Golder forwarded the applicant's letter of resignation and requested Ms Sobotka "*forward the acceptance letter to [the applicant]*" and copy it to her.

[26] The same day Ms Sobotka forwarded to Ms Golder a letter signed by Holly Coppins, Manager of Selwyn Park Whangarei. The letter confirmed an agreement was reached to retract her dismissal and accept her resignation. It noted the respondent was reporting its findings to the Nursing Council.

[27] The respondent relies upon Ms Sobotka evidence about a telephone conversation with Ms Golder to show a full and final settlement agreement was concluded. Ms Sobotka alleges she called Ms Golder after receiving the applicant's

personal grievance on an unspecified date to ask her whether she was aware of the grievance. Ms Sobotka's evidence was Ms Golder "*had been clear with the applicant in August about how Selwyn's agreement to treat her dismissal as a resignation would be in full and final settlement, and that Mrs Nayathodan would not be able to raise any personal grievance.*" Ms Golder then confirmed the applicant said she understood and agreed to a settlement on that basis before she submitted her resignation letter.⁴

[28] This evidence is hearsay. Although I have the discretion to "*take into account such evidence ... as in equity and good conscience it thinks fit, whether strictly legal evidence or not*" (s160 (2)), the exercise of my discretion must be undertaken upon a principled basis.

[29] Although it does not apply to the Authority, the Court has held the Evidence Act 2006 shall "*affect and guide the exercise of the equity and good conscience test*".⁵ Section 18 Evidence Act 2006 provides for the admission of hearsay evidence if the circumstances relating to the statement provide reasonable assurance that the statement is reliable and either the maker of the statement is unavailable as a witness or there is undue expense and delay if the witness were required to appear. These sections are helpful in guiding the exercise of my discretion here.

[30] I have concerns about the reliability of this evidence. Firstly there was no contemporaneous note of this conversation produced. Secondly, there is a lack of detail about this conversation. There is no recorded date or time this conversation took place. It does not appear to be a verbatim recall of the conversation, but rather a summary of what was allegedly said.

[31] This evidence also conflicts with previous statements by Ms Sobotka about the same conversation in a letter to the applicant dated 28 November 2013.⁶ The agreement appears to settle the grievance about the disciplinary process only. It does not state the agreement fully and finally settled all the applicant's personal grievances. It then goes on to deal with the applicant's personal grievance of sexual harassment

⁴ BOE LV Sobotka paras 30 to 31

⁵ *Maritime Union of New Zealand Inc v TLNZ Ltd* [2007] ERNZ 593 (EmpC) at [14]. This was in the context of the Court's discretion to admit evidence under s 189(2) of the ERA 2000

⁶ Attachment 5 Statement of Problem

separately from her personal grievance about the dismissal. Ms Sobotka does not raise the alleged agreement as having settling the sexual harassment grievance. Rather she refers to it being barred due to time limitations under s114 of the Act.

[32] The respondent was aware of the need to summons Ms Golder prior to hearing.⁷ The respondent advised it would not summons Ms Golder preferring to rely upon Ms Sobotka's evidence.⁸ It was understood at hearing Ms Golder was available and local to the place of hearing.

[33] The respondent seeks a further opportunity to call Ms Golder. There will be costs to both parties of further hearing time. It is unknown when a hearing can occur as the applicant has advised she is in India until 16 September 2014. There will be delay and cost in a further hearing but whether it is undue is unknown.

[34] In the circumstances, I decline to exercise my discretion under s160(2) of the Act to admit the hearsay evidence from Ms Sobotka about Ms Golder's conversation with the applicant. It is inadmissible.

[35] The remaining evidence is equivocal. At best it appears to show agreement about not lodging a personal grievance regarding the matters set out in Ms Golder's email dated 13 August. At worst it is an inchoate attempt at settlement.

[36] It seems more likely neither party confirmed their respective positions about retracting the dismissal and accepting a resignation with certainty. Ms Sobotka believed there was a settlement of all or some of the applicant's grievances. The applicant believed her resignation was an acknowledgement of wrong doing by the respondent.

[37] I have some doubts about the adequacy of the consideration for the applicant foregoing her statutory rights to seek a determination about her personal grievances. The alleged consideration the applicant received, as confirmed by Ms Sobotka, was her ability to tell a prospective employer she had resigned as opposed to being dismissed. The respondent required the settlement to be without prejudice. The letter accepting the applicant's resignation was also expressed as being without prejudice.⁹ Without prejudice connotes confidentiality of the settlement to the parties only. The

⁷ Minute dated 9 June 2014 at para [7]

⁸ Letter Langston Hudson Butcher dated 30 June 2014

⁹ Attachment L BOE LV Sobotka

without prejudice settlement may have precluded the applicant from speaking about her resignation at all. There was uncertainty whether the applicant could tell employers she had resigned as opposed to being dismissed. This was important given pre-employment checks included questions about notifications to the New Zealand Nurses Council (Council) and the respondent had made a notification to the Council setting out the events leading to dismissal.

[38] The notification could have also resulted in the suspension or conditions on the applicant's nurse's practising certificate. The applicant was still subjected to an investigation by the Council as part of the notification. There seemed little (if any) value to her in the settlement agreement. She also had access to free legal advice through her Union at the time, disagreed with the reason for dismissal namely incompetency and had evidence from recent performance reviews and a previous Nursing Council investigation on 30 June 2013 that she was meeting competencies.

[39] I am not satisfied on the balance of probabilities that there was a binding agreement fully and finally settling this applicant's personal grievances. The alleged settlement agreement is unenforceable and does not prevent the Authority from determining the applicant's personal grievances. The personal grievance relating to her unjustified dismissal was therefore raised within time by the email dated 13 August 2013.

If there was no binding settlement, what were the dates and times the individual personal grievances arose and were these were raised within the 90 day time limitation?

[40] The applicant was directed to file a statement setting out what dates, what events and why the event so affected/traumatised her preventing the filing of her personal grievance until 14 November 2013.¹⁰ She filed a number of documents. Unfortunately these did not show the dates and events the personal grievances arose with any clarity.

[41] Despite this impediment, the respondent was able to file a brief of evidence from Ms Sobotka setting out dates and times it became aware of various issues raised by the applicant:

- (a) *In April 2011, Mrs Nayathodan expressed to her team leader that she felt that other staff did not like her, that she did not*

¹⁰ Minute dated 24 March 2014

feel part of the team, and that she was not invited to meetings and trainings. No complaint was received by Mrs Nayathodan about any particular staff member, nor was any complaint made against Selwyn that she was ill-treated or unsupported;

- (b) *In June 2011, Mrs Nayathodan was involved in a disciplinary investigation in relation to allegations made against her by her colleagues. A discharge form from hospital records that she felt stressed and unsupported at work. ... Selwyn was not provided with a copy of this form at the time (or prior to this proceeding being commenced), and Mrs Nayathodan did not make this complaint directly to Selwyn;*
- (c) *During the disciplinary investigation in June 2011, Mrs Nayathodan complained that two of her colleagues were saying dishonest things about her. That allegation was investigated by Selwyn;*
- (d) *In July and September 2011, Mrs Nayathodan raised concerns regarding her treatment by a colleague (Dean Newton). She alleged that he called her a "bitch", and that he snapped his fingers when he wanted help. After receiving these complaints, I understand that Mrs Billington changed Mrs Nayathodan's shift, and spoke with each of Mrs Nayathodan and Mr Newton with a view to them agreeing to work together in a positive and professional manner;*
- (e) *In October 2011, Mrs Nayathodan told Mrs Billington that she felt harassed by the colleagues that had made the earlier allegations against her, and which resulted in Selwyn issuing Mrs Nayathodan with a final written warning. Mrs Nayathodan said they (her colleagues) talked in the lounge together on the nightshifts and she felt they wanted to get rid of her. Mrs Billington and Julie Governor (NZNO organiser at Whangarei at the time) counselled Mrs Nayathodan on not approaching the colleagues in question and on other coping mechanisms;*
- (f) *In May 2012 Mrs Nayathodan wrote to Mrs Billington saying that she felt harassed and humiliated by hospital team leader, Jackie McCullough, due to Ms McCullough telling her she was incompetent in front of resident's family. Mrs Nayathodan told Mrs Billington that her letter is not a complaint, but a request for "such things" to be stopped. ... I am not aware of how Mrs Billington responded to that particular complaint;*
- (g) *In May 2012, Mrs Nayathodan wrote to Mrs Billington expressing concern about how busy her evening shift was and requesting assistance. ... I am not aware of how Mrs Billington responded to that particular complaint;*
- (h) *In August 2012, Selwyn agreed to change Mrs Nayathodan's rostered hours to suit her husband's roster; and*

- (i) *On 10 October 2012, Selwyn received a copy of a medical report that was sent from Practice 92 Mt Eden Limited to the Nursing Council in regards to the Nursing Council's assessment of Mrs Nayathodan's competency to practise as a registered nurse. In that report, it referred to Mrs Nayathodan being bullied and persecuted in July 2012. As described above, Selwyn was already aware of those concerns and had sought to resolve them at the time. In the report, it also refers to Mrs Nayathodan feeling bullied by a manager who had been telling family members that she did not have adequate clinical knowledge. Selwyn understood that to be a reference to her concerns with Ms McCulloch of which Selwyn is already aware (as described above).*

[42] Ms Sobotka also confirmed the applicant told another employee she had been sexually harassed and named another registered nurse. The employee was told by the applicant to keep it confidential as she did not want to make a formal complaint.¹¹

[43] The applicant accepted she made the allegations on the dates and times set out in Ms Sobotka's evidence. She gave evidence about her feelings of helplessness and disempowerment as a result of the bullying and sexual harassment. She expressed some embarrassment and fear around raising the issues due to family pressure and cultural beliefs. She "*didn't want to make it a big issue*" because "*it's not my country*".

[44] A grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address (s.114(2) of the Act).

[45] This employment relationship was governed by a collective agreement.¹² The agreement set out a process for dealing with grievances namely speaking to your manager, another manager "*or someone else who can deal with it, so we can deal with your concern at once.*"¹³ The agreement also specifically recognised "*the undesirability of sexual harassment in the workplace*" and where a personal grievance

¹¹ BOE LV Sobotka para.21(g)

¹² Collective employment agreement 2013-2015 (NZNO and SFWU members) document 4.1 Statement in Reply

¹³ See above Part 12 Procedure Step 1.

arose, the provisions of Part 11 of the agreement may apply.¹⁴ Unfortunately Part 11 did not deal with personal grievances. Part 12 did.

[46] The Courts have held it did not matter what an employee intended a complaint to be or their preferred process for dealing with it in the first instance. Equally, it did not matter whether the employer recognised an employee's complaint as a personal grievance or not. The only issues were whether the nature of the employee's complaint was a personal grievance within the meaning of s 103 and, if so, whether the employee had complied with s 114(2) by conveying the substance of the complaint sufficiently to the employer.¹⁵

[47] All of the applicant's concerns were personal grievances within the meaning of s.103. It does not matter what her preferred process for dealing with her complaints was in the first instance.

[48] The applicant raised concerns about bullying and harassment by her colleagues on six occasions. Five of those occasions were with her manager, Sue Billington, whom has subsequently left the respondent's employment. The last time is through a medical report the respondent had in October 2011. They appear to have been raised with sufficient specificity for the respondent to make a response. The respondent did take steps in respect of the bullying complaints raised prior to May 2012. However what action (if any) was taken about bullying occurring after May 2012 was unknown.

[49] There is sufficient evidence to show a pattern of bullying and harassment complaints were raised with her manager throughout her employment with the exception of the October 2012 medical report. They were raised with sufficient specificity including what was said or done to the applicant. The fact neither party may have comprehended at the time they gave rise to a personal grievance does not prevent them from complying with s103 and 114(2).

[50] The sexual harassment complaint was raised around the time she was being supervised by the alleged offender in August 2012. She named the offender but asked to keep it confidential. The employee was not her manager and chose not to pass the

¹⁴ See above Part 11.2.2

¹⁵ *Clark v. Nelson Marlborough Institute of Technology* (2008) 8 NZELC 99,483; (2008) 5 NZELR 628 at [33] to [37] approved *Gates v Air New Zealand Ltd* (2009) 7 NZELR 41 (EmpC).

information on to management. The issue is whether this was “reasonable steps” to raise the grievance under s114(2).

[51] At hearing the applicant said she thought the employee she spoke to was in management and would pass on her complaint. It was clear this employee was in an administrative role only. In cross examination she accepted the employee had agreed to keep her allegation confidential and that she was concerned about how angry her husband would be. Given the seriousness of the complaint it is remarkable she did not tell her manager. This may have been due to the bullying and lack of responsiveness from her manager to her complaints after May 2012. It is equally surprising the employee she told did nothing with the information. This may be due to a practice, policy or training issue.

[52] Part 12 of the collective agreement does not limit the persons the applicant may raise a grievance with to her manager. There is reference to a harassment officer but there was no evidence who that may be and whether they were available at the time. The agreement does not preclude this employee being a person the applicant may raise her grievance with. The fact this employee requires better training does not mean the applicant did not take reasonable steps to raise her grievance. Her request for confidentiality does not prevent this matter from being raised as a personal grievance. This was not a without prejudice discussion. Confidentiality should have been offered irrespective to protect both complainant and alleged offender until the matter could be investigated.

[53] The statutory tests in s.103 and s.114(2) are satisfied for all of the grievances with the exception of the racial harassment complaint. There was less clarity about when the racial harassment complaint was raised. I accept the respondent’s submission it was surprised by the evidence at hearing. It should be given an opportunity to speak with Mary Richard about the raising of this complaint. The other complaints were well documented in Ms Sobotka’s evidence. There cannot be any surprise about the applicant’s evidence in this regard.

[54] The applicant has, with the exception of the allegation of racial harassment, raised her personal grievances pursuant to s114 of the Act. Whether the racial harassment concern was raised as a personal grievance within time shall be determined at hearing.

[55] In the circumstances, I no longer need to consider the third issue. Costs are reserved.

Next Steps

[56] The applicant is currently out of the country in India. She is not due to return until 16 September 2014. This matter needs to be timetabled for substantive hearing.

[57] I am in a position to offer 1 to 5 December 2014 in Whangarei for hearing. The parties are to advise their availability for hearing and their estimates of time required by **Friday 26 September 2014 3 pm**.

[58] Once a hearing date has been confirmed by the Registry timetabling orders shall apply for the parties to file any further evidence for hearing by 3 pm 4 weeks prior to the first day of hearing and evidence in reply by 3 pm 2 weeks prior to the first day of hearing.

T G Tetitaha
Member of the Employment Relations Authority